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## Tyranny and Constitutionalism beyond the State\*

Of late, a constitutional ethic has gained momentum amongst international legal academics.<sup>1</sup> This movement seeks to go beyond traditional international law tropes such as Westphalian sovereignty, state equality and subsidiarity to an understanding of the global legal order as incorporating public law components into its operation. A potential role both normative and organisational for a constitutional ethic that has traditionally been associated with the internal workings of a state is either recognised as pre-existing or declared as emergent. Whilst this ethic is furthestmost established amongst EU scholars, with increasing frequency it also forms part of international scholarship.<sup>2</sup> This article asks what has compelled international scholarship toward constitutionalism and what can be deduced about the nature of this scholarship from an analysis of its genesis.

Unquestionably public international law always contained a quality of 'publicness.' International law possesses foundational myths and legitimating language that is not contingent upon appropriating tropes from other systems. Albeit this is not to suggest an isolated legal system immune from cross-pollination but rather that the international legal order always possessed a separate publicness in its discourse and governance. These public elements comprise, amongst many others, the formation of international law, the structures of international organisations and the operation of international courts and tribunals. Nonetheless, most obviously displayed in the constitutionalisation debate but clearly demonstrable elsewhere, is a move to adopt domestic constitutional characteristics. This chapter seeks to ask why this has occurred, why lawyers whose concerns were not bound to questions of the rule of law, division of power, checks and balances, the incorporation of human rights, or democratic legitimacy have become engrossed in such debates.

The underlying rationales for choosing what traditionally were and are domestic constitutional and public law tools may range from a number of anxieties with the global legal order. These anxieties include; a perceived need to divest constituted power from a narrow set of global actors, a role in underpinning both individual and collective rights, a provision to check both the legitimacy and legalism of power, the possibility of recognising diverse points of governance within the global order, a perceived move beyond the state-consent based order to something new but as yet unarticulated and, critically, to locate a global rule of law. While legal theory has been concerned with questions of legitimacy and power, whether this is a concern with regard to public international law was often dismissed as unnecessary in a contractual consent based legal order.<sup>3</sup> Yet, clearly an inner anxiety exists that has pushed scholars into considering whether public international law may gain in legitimacy from either recognising pre-existing constitutional accounts of existing formations, both institutional and legal, or from pushing the global order to adopt these structures onto itself.

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<sup>1</sup> This includes global constitutionalism/constitutionalisation, global administrative law, global legal pluralism, global public goods and EU constitutional law amongst several others.

<sup>2</sup> N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 MLR 317-359, P. S. Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301, G. Teubner *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP, 2012), N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1

<sup>3</sup> H.L.A. Hart *The Concept of Law* (Clarendon Press, 1961) 227

One potential explanation for the move toward public law is an underlying dread amongst international lawyers that law beyond the state underpins a system of tyrannical power. That global constitutionalisation alongside global legal pluralism, global administrative law and the concern for global public goods is a response to disquiet amongst scholars that international law would fail to meet the minimum standards of governance inculcated within domestic legal orders when they adopted modern constitutionalism. That rather international law currently forms an a-constitutional order. The global legal system has moved beyond the state-consent based order of the 19<sup>th</sup> and 20<sup>th</sup> centuries but the accumulation of power beyond the state has yet to be entrenched with forms of legitimacy that would be expected when constituted power is exercised across a number of governance points. Global constitutionalism, in this scenario, provides a basis to make an argument that what is expected of a constitutional order such as the rule of law, checks and balances, democratic legitimacy and human rights, are present or are likely to be in the near future beyond the state.<sup>4</sup> Conversely, if a-constitutionality is the correct description of the current state of international law than tyranny may be the more appropriate term by which to describe its operation.

Other accounts also attempt to answer this question and this piece is not intended to challenge these but rather aims to sit alongside their explanations.<sup>5</sup> For example, Schwöbel considers that hegemony has long been a concern of international law but argues that 'the language of constitutionalism enshrines a hegemonic potential but also an alternative aspect of making visible and giving voice to those who would not be heard if it were exclusively for power politics,' and argues this is a partial explanation for the choice of constitutionalism.<sup>6</sup> On the other hand, Buchanan discusses whether constitutionalism acts a supplement to fill in what is absent from global governance.<sup>7</sup> The apprehensions raised by Hart's assessment of international law, the formalist versus natural law debate, or the purely statist view of international law are not intended as the basis for this discussion of the global legal order but rather a wish to understand what lies behind the choice of a constitutional ethic. The piece asks whether global constitutionalism is a response to a disquiet amongst scholars that international law would meet the standards of governance that took domestic legal orders toward constitutionalism. Nor is this article suggesting that there is any inevitability to the evolution of international law and that constitutionalisation is an inexorable process rather it examines the potential rationales for choosing this path.

Describing the order as tyrannical neither proposes that there is no global legal order nor makes a claim toward anarchy. Rather, this article will develop a taxonomy of tyranny based in both classical Greek

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<sup>4</sup> E. De Wet, 'The International Constitutional Order' (2006) 55 ICLQ, 51, J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalisation of International Law* (OUP, 2009), M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, C.J. Schwöbel *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers, 2011), E.U. Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 JIEL 19, 20

<sup>5</sup> C.J. Schwöbel, 'Appeal of the Project of Global Constitutionalism to Public International Lawyers' (2012) 13 *German Law Journal* 1, A. L. Paulus, 'The International Legal System as a Constitution' in J. L. Dunoff & J. P. Trachtman, (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP, 2009) 72

<sup>6</sup> C.J. Schwöbel, 'Appeal of the Project of Global Constitutionalism to Public International Lawyers' (2012) 13 *German Law Journal* 1 2-3

<sup>7</sup> R. Buchanan, 'Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches' (2006) 57 *Northern Ireland Legal Quarterly* 1, 6. See also the critique of D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP, 2008) 14

philosophy and the work of Hannah Arendt both of whom presuppose a form of governance which is a-constitutional. These two models of tyranny move beyond its contemporary use instead focusing on it as a form of governance order. Of course tyranny is not unknown to scholarship beyond the state, for example, as a riposte to Kant's global government nonetheless both the classical and Arendtian view add an additional layer of understanding by asking what such governance consists of in its operation.

The form of tyranny at the core of the anxieties pushing scholars toward constitutionalism is as Finnis describes it 'the co-optation of law as a mask for fundamentally lawless decisions cloaked in the forms of law and legality',<sup>8</sup> where using the language of law is a tool of governance rather than forming part of a legal governance order. For public international law the reliance on law as the basis of a legitimate governance order opens this trap in which rule by law cloaks the exercise of political power that within a domestic order would be considered illegitimate and contrary to the rule of law. Georgiev notes the strong symbolic value of the ideal of the rule of law but suggests that, '[t]he ideal itself cannot bring about international order but without it the concept of international order loses its attractive force.'<sup>9</sup> As such, this article is proposing wariness toward the claims to an existent constitutionalism where such claims ignore the possibility of rule by law in favour of the ideal of a rule of law order and the legitimisation it brings.

There are also several theories of tyranny that are omitted here including Machiavelli, Erasmus, Kant, Schmitt and Montesquieu.<sup>10</sup> Further this piece does not engage in the debate as to whether there was break in the ancient and modern articulations of tyranny but rather acknowledges that there is no single all-embracing idea of its governance form. The focus here is on whether a conception of tyranny is of relevance in considering the origins of the global constitutionalism debate. Tyranny is not necessarily a precursor to constitutionalism and stands as its own form of governance order. This article examines tyranny and its relationship with governance by establishing a taxonomy of tyranny by which it is possible to consider whether elements of the global legal order resemble its form. In doing so, the article considers whether it is possible to argue that it is the response to a perceived, but undeclared, tyranny within international law that has pushed scholarship to cloak itself with a constitutional ethic.

### Classical Greek Tyranny

Whilst the classical Greek tradition often contains contradictory or, at the very least, unhelpfully vague definitions of the term typically tyranny is associated with the coming to power of a force, either a single actor or group, by other than constitutional means.<sup>11</sup> Tyranny is an exceptional form of governance rather than a permanent order and thus it is separate to monarchy, oligarchy or democracy though for some it may be extrinsically linked to the weaknesses in each of these forms of governance.

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<sup>8</sup> J. Finnis, "Natural Law Theories", The Stanford Encyclopedia of Philosophy (Fall 2014 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2014/entries/natural-law-theories/>, see also John Finnis *Natural Law and Natural Rights* (OUP, 2011) 273

<sup>9</sup> D. Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 EJIL 1, 3

<sup>10</sup> D. Erasmus, William Watson Barker(ed) *The Adages of Erasmus* (University of Toronto Press, 2001), N. Machiavelli *The Prince* (OUP, 2005), C. Schmitt, *The Tyranny of Values* (Plutarch Press, 1996), Montesquieu: *The Spirit of the Laws* (CUP, 1989)

<sup>11</sup> See variously, in K. A. Morgan (ed) *Popular Tyranny: Sovereignty and Its Discontents in Ancient Greece* (University of Texas Press, 2013), R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 23 G. Anderson, 'Before turannoi were tyrants: rethinking a chapter of early Greek history' (2005) 24 *Classical Antiquity* 173

Critically, for the classical tradition it is not necessarily always a negative state of affairs.<sup>12</sup> Indeed, Lane argues that within some classical approaches tyrants may be viewed as benevolent.<sup>13</sup> Tyrannies offered justice, order and protection from the wealthy in contrast to dictators placed at the pinnacle of a particular regime. This section will not present a unified idea of tyranny from the classical tradition but rather attempts to bring together several strands of thought to suggest some common attributes in how it was understood.

Tyranny forms the starting point of Plato's *Republic*.<sup>14</sup> Here, tyranny is antithetical to the constitutional structures within other forms of governance that possess the attributes of justice necessary to resolve conflicting tensions.<sup>15</sup> For Plato tyranny forms the end point of collapsed governance systems, for example, tyranny springs from failed democracy but unlike democracy, the tyrant gains obedience by threat of violence. This link to democracy was contested by Aristotle who argued that Plato was unable to provide any historic examples for his claim.<sup>16</sup> For Plato, tyranny was connected to the human tyrannical form. Those who are tyrannical are ruled by lawless appetitive attitudes that are also displayed in democracy in its most inclusive operation. Within tyranny there is little differentiation between the tyrant(s) and their subjects as both reflect and create the political order in which they live a life without reason.<sup>17</sup> Preferring rule through the educated class, albeit he does acknowledge the ongoing tensions in choosing an elitist governance form perhaps a form of bureaucracy or technocracy in contemporary systems, for Plato neither democracy nor tyranny form good governance orders.<sup>18</sup> It is from reason that the perfect form of governance emerges but one that is restricted in who takes part in governance. Indeed, whilst rejecting tyranny Popper argues that Plato is adopting a form of totalitarianism.<sup>19</sup> Certainly Plato regarded hierarchy, even amongst citizens, as important in creating a common good and constitutional governance structure.<sup>20</sup> But even where good governance orders were established there is no guarantee of tyranny's absence. For instance, states which domestically would be considered democratic and constitutional can operate in their imperial conquests in a manner

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<sup>12</sup> G. Anderson, 'Before turannoi were tyrants: rethinking a chapter of early Greek history' (2005) 24 *Classical Antiquity* 173., V Parker, 'The Semantics of a Political Concept from Archilochus to Aristotle' (1998) 126 *Hermes* 145

<sup>13</sup> M. Lane *Greek and Roman Political Ideas* (Penguin UK, 2014) 75. Also within Greek tragedy tyrant is most often simply a synonym for King see V. Parker, 'The Semantics of a Political Concept from Archilochus to Aristotle' (1998) 126 *Hermes* 145, 158

<sup>14</sup> Plato *The Republic* (trans Tom Griffith) (OUP, 2000)

<sup>15</sup> D. Roochnik. 'The Political Drama of Plato's *Republic*' in S. Salkever (ed.) *The Cambridge Companion to Ancient Greek Political Thought* (CUP, 2009) pp. 156-177  
<http://dx.doi.org.ezphost.dur.ac.uk/10.1017/CCOL9780521867535.007>

<sup>16</sup> D. Roochnik. 'The Political Drama of Plato's *Republic*' in S. Salkever (ed.) *The Cambridge Companion to Ancient Greek Political Thought* (CUP, 2009) pp. 156-177  
<http://dx.doi.org.ezphost.dur.ac.uk/10.1017/CCOL9780521867535.007>, a critique of Plato that argues it is the basis of authoritarianism,

<sup>17</sup> Plato *The Republic* (trans Tom Griffith) (OUP, 2000), 254 R. Boesche *Theories of Tyranny: From Plato to Arendt* (Penn State Press, 2010) 28-29

<sup>18</sup> D. Roochnik. 'The Political Drama of Plato's *Republic*' in S. Salkever (ed.) *The Cambridge Companion to Ancient Greek Political Thought* (CUP, 2009) pp. 156-177  
<http://dx.doi.org.ezphost.dur.ac.uk/10.1017/CCOL9780521867535.007>

<sup>19</sup> K. Popper *The Open Society and Its Enemies* (Princeton University Press, 1963) 533-537

<sup>20</sup> R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1-256

considered tyrannical. This was particularly significant in considering Athens's imperial governance of conquered territories in comparison to its domestic arrangements.<sup>21</sup>

Boesche argues that Aristotle's view of tyranny, above other Greek iterations, has had the most enduring effect on the development of the philosophical concept.<sup>22</sup> For Aristotle, tyranny came in three forms, within barbarian countries in accordance with established law and practice, within Greece on an elective basis and, third, an entirely self-serving form that stands alongside oligarchy as an unjust or harmful system.<sup>23</sup> It is the third form which was the basis of his critique.

For there is by nature both a justice and an advantage appropriate to the rule of a master, another to kingly rule, another to constitutional rule; but there is none naturally appropriate to tyranny, or to any other perverted form of government; for these come into being contrary to nature<sup>24</sup>

The impact of the 'Thirty Tyrants' in Athens on Aristotle together with his uneasiness regarding democracy's potential under mob rule to descend into tyranny extends tyranny's structure beyond the lone figure.<sup>25</sup> Thus, while Aristotle regarded tyranny as government by one in their own interest the wish for power, pleasure and wealth which forms its driving force could also be held by a group. Aristotle also acknowledged that tyranny may come about due to the recognition by a group that their current form of governance is not what they wished. This draws them to look to an individual or group to provide an alternate which is, at times, is tyranny.<sup>26</sup> There are also examples of elected tyrants or kings who became tyrannical by overreaching.<sup>27</sup> As such while tyranny may personally be for the tyrant's own ends its emergence can be for other reasons.

In its Aristotelian form tyrannies create 'economic incentives to depoliticize their subjects' and create a form of governance that resembles the relationship between craftsman and tool.<sup>28</sup> It creates a system which establishes an unnatural political order which prohibits the development of humanity.<sup>29</sup> Tyrannies return governance to a pre-political state of dispersal which keeps individuals away from collective discussion or engagement with the rest of the polity that even a limited democracy allows. For Aristotle citizens meeting as equals and forming constitutional rule based on a limited number of actors much smaller than the broader polity but one that would serve the common good rather than the base purposes of tyranny was preferred.<sup>30</sup> Whilst Aristotle's democracy included deliberation it

<sup>21</sup> M. Lane *Greek and Roman Political Ideas* (Penguin UK, 2014) 112, See for example, J. Barnes (ed) *The Complete Works of Aristotle* (Princeton University Press, 1984)

<sup>22</sup> R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 2

<sup>23</sup> Aristotle *Politics* (Penguin, 2000), 1285a39–1285b1, R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–253

<sup>24</sup> Aristotle *Politics* (Penguin, 2000), Part XVII

<sup>25</sup> D. Teegarden *Death to Tyrants!: Ancient Greek Democracy and the Struggle against Tyranny* (Princeton University Press, 2013) 15–56. Arendt argues that this fear of the masses or mob rule was also a consistent fear of 19<sup>th</sup> century. H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 316

<sup>26</sup> K. von Fritz, *Äristotleis Contribution to the Practice and Theory of Historiography*, (University of California Publications in Philosophy 1958), 137

<sup>27</sup> Aristotle *Politics* (Penguin, 2000), 1310b18–20, 26–28

<sup>28</sup> Aristotle *Politics* (Penguin, 2000), 1311a9–11; 1311a3–6, R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 10, Aristotle, *Nicomachean Ethics*, 1161a30–1161b4.

<sup>29</sup> Aristotle *Politics* (Penguin, 2000), 1279a22–1279b10;

<sup>30</sup> Aristotle, *The Athenian Constitution* (trans. P.J. Rhodes) (New York, 1984), Ch. 6

certainly was not the modern idea of constitutional democracy. It specifically excluded women, slaves and anyone involved with trade thus tending toward an elite that while not as extreme in its exclusion as the Platonic model but creates a rather thin line between who is considered able for governance and who is not.

Boesche categorises Aristotle's guidance to tyrants who wished to maintain power into five strands. First de-politicize the population, second, divide citizens to prevent them from organizing politically against the tyranny, third, tyrants must know how to use and be effective with violence as well as maintaining a monopoly over it, fourth, they must be adept at deception including inventing terrors and bringing distant dangers near and finally they must appear to rule constitutionally even if in reality their rule is arbitrary.<sup>31</sup> This advice provides an intriguing insight into the maintenance of tyranny albeit arguably it is of utility to anyone who wishes to maintain governance control no matter their system of governance even liberal constitutional democracies.<sup>32</sup> Most importantly however is, as Boesche suggests, that 'tyrants must make bows towards legality.'<sup>33</sup> That while it remains an a-constitutional structure, it is important to retain the pretence of legality and critically constitutional legality. Donning the cloak of constitutional law is thus an essential characteristic for an Aristotelian tyranny.

Five core elements may be gleaned from this brief overview of classical tyranny; the single or collective figure, tyranny's emergence outside of a constitutional structure, its relationship with imperialism, the benefit accrued to the tyrant(s) and finally the need to de-politicise governance. First, whilst the single tyrant is by far the most common form this is by no means definitive. The firm link to democracy as mob rule or the Thirty Tyrants in Athens suggests that the form tyranny can take is myriad thus enabling a much broader idea of a plurality of tyrants to co-exist with single iterations and, as such, allows for the integration of more modern ideas of tyranny which will be discussed later such as bureaucracies, technocracies or class.<sup>34</sup>

Second, gaining power outside of a constitutional structure is a common thread in classical discourse on tyranny, indeed tyrants are not regarded as constitutional bodies. Albeit the lack of constitutionality appears to be a matter of gradation rather than a specific historical attribution to any particular tyrant. As such, whether a particular governance structure is a tyranny can appear to be in the eye of the beholder. Nonetheless, its a-constitutional structure establishes an idea of law and power being intertwined in understanding tyranny even if that tyranny creates an unjust system that merely has the attributes of a constitution rather than embodying constitutionalism.<sup>35</sup>

Third tyranny's relationship with the exercise of imperial power. States can be considered tyrannical in their exercise of power beyond the state whilst maintaining a constitutional order at home. This of

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<sup>31</sup> R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 18 – 20 , 97

<sup>32</sup> T. Hale, D.Held, K. Young Gridlock, *Why Global Cooperation is Failing when We Need It Most* (Polity Press, 2013) 94

<sup>33</sup> R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–2520, Boesche also discusses the tyrant's need to appear religious and to appear to rule like a king.

<sup>34</sup> K. A. Morgan, 'The Tyranny of the Audience in Plato and Isocrates' in K. A. Morgan (ed) *Popular Tyranny: Sovereignty and Its Discontents in Ancient Greece* (University of Texas Press, 2013) 182 – 183, K. A. Raaflaub, 'Stick and glue: The function of tyranny in fifth-century Athenian democracy' in K. A. Morgan (ed) *Popular Tyranny: Sovereignty and Its Discontents in Ancient Greece* (University of Texas Press, 2013) 182 – 183, B. M. Lavelle, *Fame, Money and Power: The rise of Peisistratos and "democratic" tyranny at Athens* (Michigan Univ. Press. 2005)

<sup>35</sup> Aristotle *Politics* (Penguin, 2000), Book VII

particular consequence when considering whether democratic states acting beyond their state boundaries can claim to be less tyrannical in their actions because of their domestic structure.

Fourth, tyranny is generally to the advantage of tyrant. As Aristotle argued,

tyranny is just that arbitrary power of an individual which is responsible to no one, and governs all alike, whether equals or better, with a view to its own advantage, not to that of its subjects, and therefore against their will. No freeman willingly endures such a government.

Yet, as Lane also suggests tyrants can also be regarded as benevolent and for Plato were an inevitable reaction to the failures of governance that emerge from democracy. The advantage gained by being a tyrant may be material or political but is never regarded as purely altruistic on the part of the instigator(s) of tyrannical governance. Fifth, tyranny seeks to de-politicise governance. In creating an order that denies humanity and natural democratic discussion it must operate in a space where deliberation and debate are denied.

What can be gleaned about the nature of tyrannies from this summation, first tyranny does not mean the absence of legality. Whilst it is a-constitutional it operates within a surround of law and indeed may lean toward couching decisions that ought to be political in their character as purely legal and technocratic in its attempts to de-politicise. Systems of governance which may be regarded as legitimate may be tyrannical or have traits in that direction, for Plato that included democracy for others it is not democracy but it may be democracies acting beyond the state. The tyrannical system is to the benefit of the tyrant, what this advantage may be varies but there is a significant advantage to being a tyrant. When this advantage aligns with the interests of the population the benefits shared by the tyranny may be regarded as benevolent. Tyranny can emerge from other systems operating inefficiently and the intent can be benign or positive and have more generalised support but tyranny remains the tool of the power holders. Indeed, in looking toward pre-constitutional systems as tyrannical or alternately as occasional moments where constitutional structures lapsed due to bad governance, thus including elected tyrants, there is a wider understanding of how tyranny operates. Whilst for Plato the focus was on the extra-legal character and Aristotle upon the pursuit of a particular interest, what is evident is that for both tyranny was a-constitutional.

### Arendt and Tyranny

Arendt's view of tyranny is very much tied to her consideration of totalitarianism and in particular the latter's emergence in the 20<sup>th</sup> Century as a form of governance. Although not adhering to all of its precepts her conception is also situated within the historical development of tyranny since the classical period. According to Canovan, Arendt is attempting to move away from imposed notions of governance dating from Plato by accounting for human plurality in her work.<sup>36</sup> In doing so, Arendt develops a particular view of tyranny which is both classical in its origins but very much contemporary in its understanding of governance in the modern era.

The role of law and its relationship with power and violence is particularly significant in Arendt's break from classical conceptions of tyranny. Power, violence and law are three distinct elements and tyranny must be understood in that frame. Arendt argues that the relationship between law and power has been overshadowed by classical clichés suggesting that eighteenth-century philosophy and more modern conceptions of government have erroneously relied upon classical categorisations of law,

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<sup>36</sup> M. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (CUP, 1994) 207



power and interest and variations therein.<sup>37</sup> Arendt contends that there are two sides to law; law as a limitation on power and contemporaneously power's enforcement of law.<sup>38</sup> Arendt argues that what the Enlightenment incorrectly took from antiquity's creation of republics was the supremacy of the rule of law. In doing so obedience to law simply replaced obedience to men and the dichotomy between law and power, and in particular, how to bring about lawfulness became largely absent from consideration.<sup>39</sup> As a result of this error Arendt argues tyranny mistakenly became a term of art used to describe any lawless government or more particularly the difference between a lawful or constitutional government and a lawless or tyrannical government, or perhaps to put it in constitutional terms, the absence or presence of the rule of law.<sup>40</sup> For Arendt this entirely misses how power and law interact. Arendt argues that tyranny raises the boundaries of law leaving behind a system which is not based on liberty. Though unlike totalitarianism it still leaves room for action and in doing so it remains egalitarian in that it is the tyrant(s) against all others.<sup>41</sup>

Benhabib argues that Arendt regards constitutional government as a system where law acts as a hedge allowing people to orientate themselves whereas tyranny is more akin to a desert.<sup>42</sup> For Arendt the work of Montesquieu is of particular import in breaking from the Platonic view of law and power. In recognising that power could be divided between the making of law, the executing of decisions and judging Montesquieu by recognising action and change was able to depart from Plato's view of the inevitability of failure in all forms of governance and their ultimate dissent into tyranny.<sup>43</sup> Critically it was this introduction of what was to become a constitutional norm, the division of power, which was essential. For Montesquieu danger lies where the only protection from tyranny is custom. Law, and what would become modern liberal constitutionalism, is required to prevent the emergence of tyranny. For Montesquieu the separation of powers stood as a safeguard against tyranny as it prevented power from settling into one set of constituted power holders and gave each point of governance the ability to curtail the action of the others if such activity was deemed *ultra vires*. Montesquieu brought about a break in democracy as potentially tyrannical with the introduction of a new form of constitution, a 'legally unrestricted majority rule, that is, a democracy without a constitution' suffocates dissent but new constitutionalism which renovates the classical form prevents this occurrence.<sup>44</sup>

Arendt divides power from violence and this is critical in her understanding of tyranny, in that it can (occasionally) exist without violence.<sup>45</sup> Power is all against one whereas violence is one against all, power doesn't need to be justifiable as it inherent within political action but needs to be legitimate whereas violence may be justifiable but not legitimate.<sup>46</sup> For Arendt, violence can destroy power but

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<sup>37</sup> H. Arendt *On Violence* (Harcourt 1969), 40, H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713-726

<sup>38</sup> H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713-726

<sup>39</sup> H. Arendt *On Violence* (Harcourt 1969), 40

<sup>40</sup> H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713, 714

<sup>41</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 466, Hannah Arendt, *Between Past and Future* (Penguin Classics, 2006) 98

<sup>42</sup> S. Benhabib *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield, 2003)

<sup>43</sup> H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713, 722, Montesquieu *The Spirit of the Laws* (CUP, 1989) 72

<sup>44</sup> Montesquieu *The Spirit of the Laws* (CUP, 1989) 72

<sup>45</sup> H. Arendt *On Violence* (Harcourt 1969), 37 -42

<sup>46</sup> H. Arendt *On Violence* (Harcourt 1969), 50-52

cannot substitute for it, the combination of force and powerlessness creates 'impotent forces' which leave very little behind.<sup>47</sup> She argues that this combination in classical theory is understood as tyranny. But, the fear of tyranny comes not from cruelty, which she argues can be countered by benevolent tyrants and enlightened despots, more exactly it is the impotence and futility which condemns both rulers and ruled that establishes our discontent with it as a form of governance.<sup>48</sup>

Powerlessness is key to understanding tyranny because it isolates the ruler from the ruled. The drive toward the establishment of a political community is absent in tyranny, no matter its benevolence and the absence of the public realm removes power.<sup>49</sup> Yet, for Arendt, tyranny's short-term advantages, stability, security and productivity in themselves pave the way toward its own end as these gains lead to participation and from this political action which in turn creates power beyond the tyrannical form brings about its demise.

As was discussed in the previous section tyranny need not necessarily be a negative attribute of governance and indeed as Arendt suggests some have advocated it as a form of good governance.<sup>50</sup> For example, according to Arendt, Hobbes is proud to admit that the Leviathan amounted to a permanent government of tyranny, 'the name of Tyranny signifieth nothing more nor lesse than the name of Sovereignty'.<sup>51</sup> Arendt suggests that Hobbes was in actuality attempting to justify tyranny which she argues had not, up to that point, been honoured with a philosophical foundation.<sup>52</sup> By taking account of the rise of the bourgeois class, a property owning elite where the acquisition of wealth can only be guaranteed by the seizure of power, Hobbes was advocating the creation of a form of tyranny.<sup>53</sup> Arendt regards Hobbes' commonwealth as leaving each individual powerless as they are without the right to rise against tyranny leaving space only for the submission of power to the tyrannical body politic.<sup>54</sup>

Arendt's historic view of tyranny typically stands alongside three modern forms of domination; imperialism, bureaucracy and totalitarianism. Totalitarianism is a system of rule which is for nobody's interest, not even the rulers and has no concern for individuals. Arendt clearly distinguishes between tyranny and totalitarianism, the latter insists on establishing each individual in a lonely state whilst the former leads to mere impotence. This makes totalitarianism far more dangerous and destructive. Unlike tyranny which is lawless, totalitarianism operates in accordance with what it presupposes to be the law of nature or history.<sup>55</sup> Tyrants never identify themselves with subordinates whereas the totalitarian leader must be all encompassing and be responsible for all thus no criticism of any element of governance can be countenanced as it would be a censure of the leader and the system in its entirety.<sup>56</sup> For Arendt the fundamental difference between modern dictatorships and tyrannies is that terror is no longer aimed at opponents but in ruling the masses, it has turned inward.<sup>57</sup> As such a rights

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<sup>47</sup> Montesquieu *The Spirit of the Laws* (CUP, 1989) 72202-203

<sup>48</sup> H. Arendt, *The Human Condition* (University of Chicago Press, 1958) 202-203

<sup>49</sup> H. Arendt, *The Human Condition* (University of Chicago Press, 1958) 221

<sup>50</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 144- 146

<sup>51</sup> T. Hobbes *Leviathan* (CUP, 1996) 486

<sup>52</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 144- 146

<sup>53</sup> T. Hobbes, *The Leviathan*, (CUP, 1996), 486, H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 144- 146

<sup>54</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 146, H. Arendt, *Between Past and Future* (Penguin Classics, 2006) 96

<sup>55</sup> M. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (CUP, 1994) 88, H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 484

<sup>56</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 374

<sup>57</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 6

discourse can remain in tyranny, particularly the right to resist the tyrannical power as it tends away from consistent arbitrariness, as such, one has to oppose it to be punished by it.<sup>58</sup> The tyrant takes away the right to possess rights whereas the totalitarian regime operates on the basis that none exist.<sup>59</sup> Arendt views totalitarianism as the absolute and most destructive form of governance that moves beyond all previous forms of negative regime.

Echoed in antiquity is Arendt's consideration of imperialism and its relationship with tyranny. For Arendt 'tyranny, because it needs no consent, may successfully rule over foreign peoples, it can stay in power only if it destroys first of all the national institutions of its own people.'<sup>60</sup> Using both the French and British imperial structures, with the former attempting to spread its values and cultures and the latter staying aloof from this enterprise, Arendt builds a picture of imperial tyranny in operation. Arendt argues that imperialism can only result in the destruction of the nation state when the flag becomes a commercial asset and patriotism loses its value in its use for money making purposes and centres this critique in a historical analysis of imperialism in the 19<sup>th</sup> Century.<sup>61</sup> The British imperial structure being the exemplar in that it attempted to keep national institutions separate with administrators consistently resisting any attempts to export justice or liberty from home.<sup>62</sup> In contrast to Roman imperialism in which all became bound by a common law in modern imperialism this is absent. Consent is enforced and tyranny prevails no matter the domestic arrangement of the home nation-state.<sup>63</sup> Thus, constitutional states acting outside their state boundaries may, much as in antiquity, be tyrannical.

Arendt suggests that rule by nobody, bureaucracy, may be one of the cruellest and most tyrannical forms of governance.<sup>64</sup>

We ought to add the latest and perhaps most formidable form of such domination: bureaucracy or the rule of an intricate system of bureaus in which no men, neither one nor the best, neither the few nor the many, can be held responsible, and which could be properly call rule by Nobody. (If, in accord with traditional political thought, we identify tyranny as government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done.)

Bureaucracy establishes haphazard universal settlements and procedures from which there is no appeal. There is nobody behind the will out of which decisions emerge and because of this bureaucracy is more dangerous than mere arbitrary tyranny.<sup>65</sup> The creation of vast systems of faceless decisions from which no answers emerge creates a new form of tyranny that has become ever more present in the contemporary era.

For Arendt, tyranny is not of the kings and despots of history but has contemporary character. Not in totalitarian regimes but in other authoritarian forms, including bureaucracy and imperialism. Law is

<sup>58</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 433

<sup>59</sup> H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 297

<sup>60</sup> H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 128-129

<sup>61</sup> H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 125

<sup>62</sup> H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951) 131, see further, T. Frost and C.R.G. Murray, 'The Chagos Islands Cases: the Empire Strikes Back' (2015) 66 *Northern Ireland Legal Quarterly* 263-288

<sup>63</sup> H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 125

<sup>64</sup> H. Arendt, *The Human Condition* (University of Chicago Press, 1958) 40, H. Arendt, *The Promise of Politics*. (Schocken, 2009) 78

<sup>65</sup> H. Arendt, *The Promise of Politics*. (Schocken, 2009) 78

central to Arendtian tyranny as it is situated within lawlessness. Constitutional tyranny is not a possibility, not only due to tyranny's existence only in the absence of law but also because constitutional norms such as division of power and the rule of law provide bulwarks against the dissent of some forms of governance, such as democracy, into tyranny. It is the limitations to what tyranny can achieve that underlies the wish to have alternate forms of governance. Arendt points to the fear of tyranny coming from impotence and futility of action rather than a terror of cruelty. This limitation emerges from the absence of a public realm within tyranny and the push toward a plurality or political community that often signals the end of tyrannical governance. Constitutionalism is an agent against tyranny in that the division of power, its limits on majoritarian democracy, and the rule of law provide the lawful space in which plurality can occur, an anathema to tyrannical governance. As with antiquity, tyranny can be benevolent but this benevolence is caged by the need to keep the public realm from emerging, as such, it is inadequate. Arendt suggests that constitutional democracies states can, particularly through imperialism but not just in that instance, be tyrannical in their dealings beyond the state. In combination, this understanding of tyranny means that it has a modern form and may be identifiable in contemporary governance.

### Understanding Tyranny?

Whilst this was not a comprehensive overview of either classical or Arendtian tyranny the purpose was to draw together some of the essential themes which underlie our understanding of tyranny and to suggest why there may be an underlying fear of being engaged in a system which has all or some of its traits. Both the classical and Arendtian notions of tyranny clearly have contemporary resonances but perhaps more critically overlap in some of their articulations of its governance form. This article suggests that it is within this intersection between the two forms in which we may find a common understanding of tyranny from which a taxonomy of tyranny maybe adduced.

First, tyranny remains relevant. Some of its characteristics may evolve, as it did, for instance, during the Greek classical period, but there remains a common core to how it is understood. Second, tyranny is consistently a-constitutional. For Arendt this includes a lawlessness that goes beyond the Greek construction, but, critically, such lawlessness does not suggest chaos or anarchy. Rather, it is the manner and form in how law emerges which is of import. For the Greeks law exists but as a form to de-politicise the public realm and with technocracy taking its place. So too for Arendt where the emergence of bureaucracy as a new form of tyranny demonstrates the de-politicisation and the creation of rule by Nobody, not in the complete absence of law but in a lawless realm where the public realm removes the legitimate creation of law and the politics to which it ought to adhere.

Third, constitutionalism plays a key role in understanding what tyranny is not. Constitutional systems, for Arendt, stand as a bulwark against tyranny. The rule of law, the division of power and the limits upon majoritarian politics are critical constitutional norms that prevent democracies in particular from dissent into tyranny. For the Greek tyrannical form this is not as straightforward in that democracy was for Plato itself tyrannical or would ultimately descend towards it and so too for Aristotle when democracy moved beyond a limited class. But critically tyranny lacks the legitimacy that is associated with the other forms of constitutionalism identified in the Greek period. Thus, constitutionalism stands to defeat tyranny either by its creation out of a tyrannical system or its restoration after an interregnum.

Fourth, in both its emergence and its practice tyranny may be benevolent. Nonetheless, there are limits to what its benevolence can achieve. For the Greeks tyranny can emergence from bad or

malfunctioning systems but its limitations is based on it being the tool of the power holders. Similarly, for Arendt but its limitations emerge from the absence of a public realm. Indeed, the more benevolent the tyranny the more likely it is to sow the seeds of its own ends as the push toward a public community and politics will become ever more pressing. The benevolence of a tyranny thus limits what can be achieved by that governance order.

Tyranny, whilst it may be benevolent is generally to the benefit of the tyrant(s). As such, its fifth characteristic is that those holding power benefit most from the system. This does not necessarily mean avarice or cruelty but it does imply a governance order which inculcates a system of benefits to the holders of power within that system ensuring that the monopoly over power will always accrue a profit.

Sixth, and finally, a domestically constitutional state may be tyrannical in actions beyond its borders. Imperialism is the key example for both the Greeks and Arendt, but the underlying thesis for both is important. Domestic constitutionalism is no bulwark against tyrannical action beyond the state and indeed both were able to point to clear examples where this was the case. Both considerations of tyranny regard such external tyranny as ultimately having a detrimental impact on whom such action is pointed toward but also upon the tyrannical actors themselves.

These six characteristics establish a taxonomy of tyranny under which a core understanding of its form may be uncovered. The resonances with some elements of contemporary governance is evident and in the next section this taxonomy will be utilised to grasp whether the current global legal order could be said to be in part or in sum tyrannical in nature and if this is the case whether this is the anxiety that pushes academic discourse toward constitutionalism beyond the state.

### Rule of Law and Global Constitutionalism

Generally considered to be a desirable element of any governance system the rule of law forms a core element of any order pertaining toward constitutionalism albeit its presence does not of itself establish the existence or a trajectory toward a constitutional order.<sup>66</sup> Focusing on instances where it is questionable whether it is rule of law or rule by law that subsists within international law this section asks whether there are resonances between attempts to identify the presence of the rule of law and the possibility of international law being regarded as possessing some elements of a tyrannical order. At times, what is tantamount to complacency regarding the presence of the rule of law within international law permeates debates on constitutionalism and beyond this to wider discussions on global governance. This tendency relies on an almost unquestioning belief in the rule of law's presence that arguably suggests that its absence may hint at something unpalatable about the legal order. Raz is correct in cautioning against using the rule of law to describe all the positive elements of a legal order while Waldron's warning against regarding it as nothing more than the assertion that our side is great are perhaps the most critical in considering international law.<sup>67</sup> At its core the rule of law requires law to be applied equally, created openly and administered fairly and it is from this basis that it is understood here.<sup>68</sup> The taxonomy of tyranny put forward, whilst not directly concerned with the rule of law as such, requires that aspects of these three elements of the rule of law be absent for tyranny to flourish.

<sup>66</sup> A O'Donoghue, *Constitutionalism in Global Constitutionalisation* (2014, CUP) 14

<sup>67</sup> J. Raz *The Authority of Law* (OUP, 1979) 210, J. Waldron 'Is the Rule of Law an Essentially Contested Concept' in J. Bellemy (ed) *The Rule of Law and the Separation of Powers* (London, Ashgate, 2005) 119

<sup>68</sup> A O'Donoghue, *Constitutionalism in Global Constitutionalisation* (2014, CUP) 31

The extension of governance alongside the creation, administration and adjudication of law beyond the state raises questions regarding why power is wielded at certain points, who the constituted power holders are and from where they gain their legitimacy. From a more traditional perspective, some proffer that states make the law and thus whilst it is imperfect governance anxieties with its operation are not as seriously compromising as what may be imagined.<sup>69</sup> Alternatively, states are the constituted power holders, they are internally legitimate and thus they legitimately create law beyond the state.<sup>70</sup> Yet, there is a disjuncture between the constituent power holders who choose the constituted power holders within their state and their interests and the global interests for which public international law and global public law operate in response to.<sup>71</sup> Within a domestic constitutionalised system constituted power holders act in the interests of constituent actors not, as in this instance, for global or other interests.

Dyzenhaus argues for a distinction between rule of law and rule by law, the latter meaning compliance with whatever laws have been positively enacted no matter their content whereas rule of law also requires adherence to the principles of legality. This legality being in line with Fuller's list of generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy and congruence, the majority of which must be complied with most of the time for a system to be in conformity with the rule of law.<sup>72</sup> Both also argue that rule by law is to some degree legitimate as it implies some degree of rule of law. However, what the tipping point from one to the other is remains obscure. Dyzenhaus goes on to argue that 'not only is the choice to abide by the rule of law a matter of political incentives, the same is true of the choice to use rule by law to achieve one's own ends... [o]ne who is in a very powerful position will submit to ruling at various points away from the rule by law end of that continuum only when it is expedient to do so.'<sup>73</sup> As such, it is possible to have pockets of rule of law.<sup>74</sup> Nonetheless, having pockets or elements of legality may be on a continuum toward rule of law, they do not necessarily comport with a public law ethic that could be described as constitutional. Yet, can it be described as tyrannical and is this what is pushing scholars toward proclaiming global governance as constitutional law.

Identification of the rule of law beyond the state comes in several forms. For instance there is Henkin's oft quoted statement that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all the time' with some considering such compliance as a satisfactory demonstration of a rule of law ethic.<sup>75</sup> There is also much reliance on the UN Charter as a core constitutional document in an international rule of law based on the UN as an organisation whose status emerges from its common place amongst members. For Fassbender this means that the 'United Nations is an organization based on the concept of the rule of law. The organs of the UN are bound to

<sup>69</sup> J. Crawford, 'International Law and the Rule of Law' (2003) 3 *Adelaide Law Review* 24

<sup>70</sup> A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579

<sup>71</sup> J. L. Goldsmith and E. A. Posner *The Limits of International Law* (OUP, 2005) 200, T. Macdonald and K. Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17 *EJIL* 89

<sup>72</sup> L. L. Fuller, *The Morality of Law* (Yale University Press, 1969), chapter 2 and J. Raz, *The Authority of Law* (OUP, 1983) 223

<sup>73</sup> D. Dyzenhaus 'The Compulsion of Legality' in V. Ramraj (ed) *Emergencies and the Limits of Legality* (CUP, 2008) 37, see also D Dyzenhaus, 'The Legitimacy of the Rule of Law' in D. Dyzenhaus, M Hunt, and G. Huscroft (eds) *A Simple Common Lawyers: Essays in Honour of Michael Taggart* (OUP, 2009) 33-54

<sup>74</sup> D. Dyzenhaus *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP, 2010)

<sup>75</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy* (New York: 2nd Ed. Colombia University Press, 1979), 47

comply with the rules of the UN Charter, which is the constitution of the United Nations.<sup>76</sup> For Brownlie the 'moral purpose of the United Nations was the promotion of the rule of law.'<sup>77</sup> Albeit not arguing that the Charter established an international rule of law rather he suggests that the concept is not unfamiliar to law beyond the state. A political willingness to employ the term certainly appears to exist with UN Member states in 2005 affirming that 'an international order based on the rule of law and international law' was the ideal. But what is telling about this last statement is the notion that this was the ideal perhaps acknowledging that it is not as firmly established as some commentators such as Fassbender might suggest. The premise of an institution focused on the rule of law extends beyond the UN to other organisations such as the WTO, where the focus tends to be on its Dispute Settlement arm but has a similar ethos that, without really defining its content, there is a rule of law beyond the state we just have to identify it.<sup>78</sup>

Yet, contemporaneously disquiet regarding increased governance beyond the state has become more consistent with questions of whether a rule of law or, perhaps in reality, rule by law endures. There are several examples of this angst. Some are based on the historical role law played in creating a global governance order that continues to favour the Global North.<sup>79</sup> Others focus on the actual operation of the legal order. Bianchi questions whether the ad hoc nature of international law suggests an absence of the rule of law arguing that the exceptionalism in the period running up to the 2003 invasion of Iraq demonstrates a reliance on hard cases rather than rule of law in decision making. This, he argues, undermines any constitutionalisation process.<sup>80</sup>

The multitude of international bodies, NGOs and corporations engaged in the administration of post-conflict territories poses questions as to what oversight and regulation they are subject to in their exercise of constituted power.<sup>81</sup> Critically such transitional governance raises issues around the open creation, equal implementation and fair administration of law with regard to the individuals living within their power.<sup>82</sup> Whilst bodies established beyond the state are often engaged with the implantation of human rights, criminal law, constitutionalism and economic transformation of the

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<sup>76</sup> B. Fassbender, Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter [www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf) 19, 25, 28, B. Fassbender, 'The United Nations Charter as Constitution of The International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, J. Wouters and M. Burnay, 'Introduction: The International Rule of Law: European and Asian Perspectives', 46 *Revue Belge de Droit International* 2013, 299-306

<sup>77</sup> I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague: Martinus Nijhoff, 1998), 1

<sup>78</sup> E.U. Petersmann, 'How to Promote the International Rule of Law-Contributions by the World Trade Organization Appellate Review System' (1998) *Journal of International Economic Law* 25, D. Cass, *The Constitutionalization of the World Trade Organization* (OUP, 2005)

<sup>79</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004), B. S. Chimni *International law and world order: a critique of contemporary approaches* (Sage Publications, 1993)

<sup>80</sup> A. Bianchi, 'Ad-hocism and the Rule of Law' (2002) 13 *EJIL* 263, 270

<sup>81</sup> M. Saul *Popular Governance of Post-Conflict Reconstruction: The Role of International Law* (CUP, 2014)

<sup>82</sup> E. De Brabandere, 'Post-conflict administrations in international law: International territorial administration, transitional authority and foreign occupation in theory and practice' (Leiden/Boston: Martinus Nijhoff Publishers 2009), S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-building* (OUP, 2005) A. O'Donoghue, 'The exercise of governance authority by international organisations: The role of due diligence obligations after conflict.' in M. Saul and J. Sweeney, *International Law and Post-Conflict Reconstruction Policy* (Routledge, 2015) 45-66

transitional states this is only rarely reflected back on their own operation to hold them more fully accountable for their exercise of constituted power.<sup>83</sup>

Emerging first as a legislative body and second as a body with direct engagement with individual lives the actions of the Security Council have caused much debate.<sup>84</sup> The Security Council's role as a legislative body has taken hold since the beginning of this century.<sup>85</sup> The creation of the International Tribunal for the Former Yugoslavia and the questioning of the Security Council's ability to create an adjudicative body was one of the first such actions and remains hotly debated.<sup>86</sup> The decision to pass Chapter VII resolutions requiring states to undertake legislative actions regarding but not confined to terrorism coupled with the creation of Terror Lists which includes over 200 individuals and the Committee designed to oversee this list have added to these discussions. This has brought the UN body into a new governance position where the manner in which law is created and implemented is brought to the fore and is central in questioning whether the Security Council is acting *intra vires*.<sup>87</sup> Fassbender's Report on the Security Council and due process found that it did comply with all its obligations under the Charter, including several references to the rule of law but this conclusion has been much contested.<sup>88</sup> Whilst this report led to the creation of an ombudsperson to review the terror listing process this was a very limited step in a situation where the listing process itself and the system of appeal remains opaque.<sup>89</sup> In particular, the ombudsperson's remit still leaves many questions best exemplified by the cases taken by those fortunate to live within the jurisdiction of the ECJ and thus possessing an avenue to question their inclusion on the list.<sup>90</sup>

These examples may be added to by many others. For instance, the role of principally non-public actors in judicial activities within international economic law where hearings are most often heard in private and where the appeal processes are limited.<sup>91</sup> Or, the role of economic institutions such as the World

<sup>83</sup> R. Freedman 'UN Immunity or Impunity?: A human rights based challenge.' (2014) 25 EJIL 239

<sup>84</sup> S. Talmon 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175, I. Johnstone, 'Legislation and adjudication in the UN Security Council: Bringing down the deliberative deficit' (2008) 102 *American Journal of International Law* 275-308.

<sup>85</sup> J. E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 874, S. Talmon 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175

<sup>86</sup> Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333

<sup>87</sup> Security Council resolutions 1373 (2001) and 1624 (2005) Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, [www.un.org/sc/committees/1267/aq\\_sanctions\\_list.shtml](http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml)

<sup>88</sup> B. Fassbender, Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter [http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf) E. Cannizzaro 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *International Organizations Law Review* 189-224

<sup>89</sup> <https://www.un.org/sc/suborg/en/ombudsperson>, G. L Willis, 'Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson' (2010) 42 *Georgia Journal of International Law* 673

<sup>90</sup> P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351, See for example E. Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *International Organizations Law Review* 189, O. Schachter, 'Self-Defence and the Rule of Law' (1989) 83 *American Journal International Law* 259

<sup>91</sup> M. Darrow *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, (Hart 2003), There is a move within the WTO to open some of its hearings to the public which are advertised on its website [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)



Bank Group, the IMF or a supranational body such as the EU in setting both micro and macroeconomic policies within states and the potential lack of ownership of global constitutionalism by constituent actors who may be subject to a pre-ordained hegemonic constitutionalism.<sup>92</sup> Each of these suggest that international law has moved well beyond its sovereign equality base, if that ever existed, to a scenario where individual lives are now directly affected by decisions and actors which operate beyond the state. In such a scenario the presence of the rule of law becomes a significant factor and allows us to question whether law is made openly, administered fairly and applied equally. If the conclusion is in the negative is it more honest to describe the system as rule by law and to question what the constitutionalisation process says about an order which on this brief summation appears to be entirely absent an ensconced rule of law.

These instances are not intended to create an apocalyptic or overly negative image of international law. Rather, they are to be set against the very positive outlook of an operational rule of law that is at times presented in the constitutionalisation debate. It also demonstrates the types of anxieties that exist as constituted governance extends beyond the state. As such this discussion is not about considering a domestic analysis of the rule of law, a Hartian approach or other bastions such as Hobbes to find that international law is not up to scratch or is not a legal order thus coming to the conclusion that such constitutional questions are unnecessary. Rather, it considers whether the public law ethic and the adoption of the rule of law as *in situ* is a response to an entirely different issue, not the absence of law but the global governance order's creation of law, its adjudication and administration and whether this could be considered to presently be a form of tyrannical governance. This discussion is not to be confused with foundational discussions of how we perceive law within the global order when the traditional tropes of commander and force have such little purchase. In particular, a traditional form executive, legislature and judiciary cannot be relied upon to necessarily fill the roles that a domestic system requires and indeed where qualms regarding the form that global democracy may take have led some to argue that it will, as Plato feared, descend into tyranny.<sup>93</sup>

The underlying rationales for choosing what traditionally are domestic governance tools could have emerged from a number of anxieties including: the divesting of power from a narrow set of global actors, a role in underpinning both individual and collective rights, a provision to check both the legitimacy and legalism of power and the possibility of recognising diverse points of governance within the global order and, critically, to locate a global rule of law. These brief examples demonstrate that these anxieties are real. The question is what has global constitutionalism done in response to them. This is not a discussion of the existence of law beyond the state but rather whether there is a concern that there is a rule by law system rather than rule of law and whether this anxiety has its roots in a tyrannical view and to consider whether in a legal order that has few, if any, democratic underpinnings or a division of power infused with checks or balances, the requirement of a strong rule of law becomes greater. In a differentiated system with a weak judicial arm it would be inadvisable to simply rely upon those with the law-making authority or constituted power to both establish and maintain the rule of law.

Raz argues that the rule of law ought not to be used to merely describe all the positive attributes of a particular legal system yet this appears to be the form in which the rule of law has been accepted by

<sup>92</sup> G. W. Anderson, 'Beyond 'Constitutionalism Beyond the State' (2012) 39 *Journal of Law and Society* 359, 378

<sup>93</sup> M. Koenig-Archibugi, 'Is global democracy possible?' (2011) 17 *European Journal of International Relations* 519, 520, D. Otto, 'Subalternity and international law: the problems of global community and the incommensurability of difference.' (1996) 5 *Social & Legal Studies* 337, 357

some international scholars.<sup>94</sup> In such instances legalisation, institutionalisation and rule by law are confused with the rule of law and questions regarding international law's evolution. Koskeniemi contends that 'the rule of law hopes to fix the universal in a particular, positive space (a law, a moral or procedural principal or institution).'<sup>95</sup> Too often its employment within global constitutionalism instead hides insufficiencies in global governance where perhaps more positively it could be used to critique the system. Critically, is it possible to call the anxieties and the push toward identifying a rule of law a wish to leave behind what could be described as a tyrannical order.

An assurance of democratic legitimacy within the global legal structure would militate towards simply accepting Fuller's procedural rule of law as satisfactory however the global order operates with very weak constraints thus requiring a more substantive approach.<sup>96</sup> Even if Fuller's formation were accepted the basic substantive structure would have to set the parameters of both legal and political action to prevent the development of a 'wicked system.'<sup>97</sup> This problem may be remedied by a substantive rule of law capable of acting as a safety valve albeit presently this appears absent from law beyond the state. While Fuller's arguments against a substantive rule of law are not without import within the global order the lack of judicial positioning, strong democratic systems or other forms of restraint suggests rule of law in its substantive form would be necessary. If the argument is that the rule of law, either substantive or procedural is absent or at the very least is weak within the global legal order does this automatically imply that the governance order is tyrannical? This section has certainly not argued for an absence of law, there is plenty of law, but potentially this could be better described as rule by law.

#### Tyranny, International Rule of Law

Coming back to tyranny and its six characteristics; its continued relevance, its a-constitutional content and lawlessness, constitutionalism as a bulwark against tyranny, its potential benevolence, the benefit accrued to tyrant(s), and finally that domestic constitutionalism does not necessarily prevent states from acting tyrannically beyond the state. From the foregoing discussion it is certainly not obvious that international law contributes to a purely tyrannical governance order yet some of the issues raised in the previous discussion certainly suggest some of tyranny's attributes may be present.

Leaving its first element, its continued relevance to the end, tyranny's a-constitutional character and Arendt's argument for lawlessness proffer some interesting insights. If we follow Fuller and Dyzenhaus than rule by law requires rule of law and as such there is lawfulness. Thus, if international law remains, on the whole, a rule by law system, it does not quite meet the threshold of tyrannical power that Arendt would recognise. Yet, Greek tyranny remains relevant particularly the notion that tyranny de-politicises and tends toward the technocratic. Certainly the law may be instrumentalised and Bianchi's warning against ad hocism may suggest that replacing political with legal arguments can result in the political context being replaced. This is also linked to Arendt's view of bureaucracy, or the rule of Nobody, as the modern era's worst form of tyranny. The Security Council's Terror List or the creation of micro/macro-economic policies beyond the state could be interpreted as falling into this category. This bureaucratic or technocratic turn toward expertise is not specific to law beyond the state but perhaps adds to the

<sup>94</sup> See for a further discussion, M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907

<sup>95</sup> M. Koskeniemi, *The Gentle Civilizer of Nations The Rise And Fall Of International Law 1870-1960* (CUP, 2001) 507

<sup>96</sup> L. L. Fuller, *The Morality of Law* (Yale University Press, 1969), chapter 2.

<sup>97</sup> D. Dyzenhaus *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP, 2010)

unease felt with regard to these actions and indeed the rise of global administrative law suggests that, at the very least, administration and, as such, bureaucracy, is a live issue.

Constitutionalism's role as a bulwark against tyranny is very close to this last argument and could be considered to be the biggest trigger for the turn to constitutionalism. If there is an acceptance that constitutionalism and tyranny cannot co-exist than a push toward constitutionalism ought to resolve the issues identified in the last section. Indeed, it suggests that the real benefit of a constitutional ethic beyond the state is that it gives tools to scholars to offer critique when the continuum between rule by law and rule of law tends toward the former. Of course beyond the rule of law constitutionalism also requires division of power combined with checks and balances, democracy and limits upon majoritarian politics but the potential to both push for reforms and be critical of areas that they do not reach what would be considered legitimate minimum standards of governance within states provides the global constitutional ethic with a platform to push against any tyrannical tendencies within international law.

The potential for benevolence is also critical in understanding law beyond the state as examples such as UN Sanctions Committee or the administration of states in transition demonstrate the positive tasks that international law contributes toward. It forms part and parcel of the governance system that creates the processes by which these are set up, administered and are held account. Yet, the very lack of fulfilment of very basic levels of accountability and oversight taints this benevolence with tyrannical form and as previously discussed limits what it can achieve. Both Arendt and the classical tradition agreed that tyranny included the seeds of its own end as benevolence created the groundwork and drive toward a public realm. This may also be part of the trigger toward the constitutional ethic, in that the existing benevolence is in itself fuelling a wish for the system to more fully engage and go further perhaps toward constitutionalism but also other governance possibilities.

In many ways, within the global governance order, the fifth characteristic is directly related to the sixth, that domestic constitutional structures do not necessarily mean that states acting beyond the state will not behave as tyrants. The rise of imperialism was concomitant with the rise of modern international law and both remain deeply intertwined.<sup>98</sup> Albeit authors such as Tully argue that the constitutional language can accommodate anti-imperial undertakings through its flexibility this has not prevented states from taking on the role of imperial actors.<sup>99</sup> This imperialism was largely led by states that had full domestic constitutional orders. In the contemporary era Third World Approaches to International Law clearly demonstrate ongoing acts of imperialism suggesting that the spread of constitutionalism at the domestic level has not impeded this tendency.<sup>100</sup> Other authors also question whether it is possible to consider democracy at the domestic level as offering compensation for its absence beyond the state.<sup>101</sup>

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<sup>98</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004), B. S. Chimni *International law and world order: a critique of contemporary approaches* (Sage Publications, 1993)

<sup>99</sup> J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995) 31

<sup>100</sup> N. White *Democracy goes to war: British military deployments in international law* (OUP, 2009), P. Clark, Z. D. Kaufman *After Genocide: Transitional Justice, Post-conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Columbia University Press, 2009), A. Anghie 'Decolonising the idea of "Good Governance"' in B. Gruffydd (ed) *Jones Decolonizing International Relations* (Rowman & Littlefield, 2006) 109

<sup>101</sup> A. Duxbury, *The Participation of States in International Organisations* (CUP, 2011) 299 and R. Bellamy, 'The democratic legitimacy of international human rights conventions: political constitutionalism and the Hirst case' in A. Føllesdal, J. Karlsson Schaffer and G. Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2014) 243

To return to the first characteristic, the continued relevance of tyranny. Whilst it is arguable whether the global governance order is fully or partially tyrannical and this article certainly cannot claim to sufficiently cover the constitutional ethic beyond the state to make such a claim probing this possibility is critical. The relevance of tyranny is that it both questions the motivations for the push toward constitutionalisation and other public law forms but also adds an additional purpose to these debates in suggesting that even if they are incorrect in their claims they can usefully point to insufficiencies in global governance beyond the state. Perhaps this last element is the most important, that constitutionalism offers a basis to shine a spotlight on international law's tyrannical tendencies. It is thus essential that scholars in this field take the opportunity to offer critique rather than an ever purposeful utopian view of the future of law beyond the state.

## Conclusion

This piece is not intended to question the utility of the move toward a constitutional ethic within international, regional and supra national law nor is it envisioned as an assault on the existence of law beyond the state. Rather, it is intended to add to the debate on constitutionalisation at the supranational and global levels by asking whether in making the claims toward an already realised or in train constitutional process ought we ask what the impetus for identifying these processes is, why has it resulted in a turn to constitutionalism and what it means for law's place within global governance. Further if we find that a fear of tyrannical power, and this article is certainly suggesting this, is a partial explanation for the turn to constitutionalism we can usefully engage the tools provided by it and a public law ethic more broadly, to expose where gaps in global governance exist and advise where this tends toward the tyrannical. What is evident from this overview of tyranny is that ultimately it is always a-constitutional and it is this characteristic which this article suggests is the core rationale for the turn to constitutionalism. Tyranny and constitutionalism are not concomitant thus if there is an existent constitution international law and governance cannot be tyrannical.

Thus, rather than relying on positive examples of where the rule of law is *in situ* to ignore where rule by law prevails, this new constitutional ethic could be utilised as a critique of existing fissures within law beyond the state. Instead of relying on an ever positive account of the process of constitutionalisation to make a case for its existence by adding a tyranny based understanding to the debate an account of the failure to fully engage with the entire panoply of rule of law or other public law elements such as democratic legitimacy, checks and balances or a rights based discourse would be required. Further it would make it necessary to consider what form constitutionalism must take if it is to leave behind all elements of tyranny.

Global public law will need to take up the challenge of moving from tyrannical to constituted power. The incidences within global public law where tyranny's rudimentary elements may be found are far too frequent. Yet the political and legal question is whether we wish to undertake fundamental reform based within constitutionalism or are we content with tyranny beyond the state and satisfied that the constitutional narrative may be used to cover the fissures that exist in the system rather than highlighting them. The existing ambiguities should not be used to enable an otherwise questionable constitutionalisation, or other public law process, to pass muster simply because it assuages our concerns that international law contributes to tyranny in law beyond the state.